SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 230.

PETER J. CARPENTER, Petitioner,

vs.

WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, Receivers of Wabash Railway Company, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, THE CENTRAL HANOVER BANK & TRUST COMPANY, as Trustee, and T. J. MOSS TIE COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF PETER J. CARPENTER, PETITIONER.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF PETER J. CARPENTER, PETITIONER.

This case is here pending upon writ of certiorari, awarded by this Court on the 9th day of October, 1939, to review a final judgment and opinion of the United States Circuit Court of Appeals for the Eighth Circuit, in so far as such judgment and opinion concerns the question of petitioner's right to intervene in the hereinafter mentioned consolidated cause, being the receivership of Wabash Railway Company, pending in the United States District Court for the Eastern District of Missouri, the purpose of which intervention is to enable the petitioner

to assert the priority of his claim and judgment against Wabash Railway Company for personal injuries sustained by him as and while an employee of said company.

The original date of the judgment of said Circuit Court of Appeals, here sought to be reviewed, is May 13, 1939 (R. 113). Petitioner's petition for rehearing was duly filed in said Circuit Court of Appeals on May 27, 1939 (R. 135), and was overruled on June 12, 1939 (R. 137). A thirty days' stay of mandate was granted on June 27, 1939 (R. 138). The petition for writ of certiorari was filed in this court on July 26, 1939.

I.

OPINIONS OF THE COURTS BELOW.

The opinion and decree of the said District Court appears at pages 78-83, inclusive, of the transcript of the record filed herewith, and it is not reported.

The opinion of the said Circuit Court of Appeals (R. 113-123) is reported in 103 F. (2d) 996.

II.

JURISDICTION OF THIS COURT.

1.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A. Sec. 347), to review by certiorari (heretofore granted by this Court) a final judgment and decision of the United States Circuit Court of Appeals for the Eighth Circuit.

2.

The following decisions sustain the jurisdiction of this Court to review the decision of the said Circuit Court of

Appeals for the reasons set out in the specifications of error:

Warner v. New Orleans, 167 U. S. 467;
The Anasoldo San Georgio I. v. Rheinstrom Brothers, 294 U. S. 494;
Ivanhoe Building & Loan Association of Newark v. Orr, 295 U. S. 243;
Erie Railroad Company v. Tompkins, 302 U. S. 671.

III.

STATEMENT OF THE CASE.

Prior to the commencement of the pending equity receivership of Wabash Railway Company the petitioner recovered a judgment against said company for personal injuries sustained by him as and while an employee of said company, and the petitioner now seeks to have said judgment declared to be preferred against and payable out of the assets of said company as an operating expense.

In support of his position, the petitioner relies not only upon the contentions presented in the courts below, but also upon the further fact that while his petition for certiorari was pending before this Court, the Congress passed an Act, approved August 11, 1939, amending Section 77 (n) of the Bankruptcy Act [11 U. S. C. A., Sec. 205 (n)], in the manner following:

Prior to the passage of said amendatory Act, said Section 77 (n), so far as applicable to personal injury claims of employees, read as follows:

> "In proceedings under this section, claims for personal injuries to employees of a railroad corporation, * * * shall be preferred against and paid out of the assets of such railroad corporation as operating expenses of such railroad."

By said amendment of August 11, 1939, said Section 77 (n) was made to include equity receiverships of railroad corporations now or hereafter pending in any court of the United States, so that the pertinent part of said section, as so amended, reads as follows (the words in italics being the amendment):

> "In proceedings under this section, *and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States*, claims for personal injuries to employees of a railroad corporation, * * * shall be preferred against and paid out of the assets of such railroad corporation as operating expenses of such railroad."

On February 13, 1931, petitioner recovered in the Circuit Court of the City of St. Louis, Missouri, a judgment against the Wabash Railway Company (an interstate railroad), for personal injuries sustained on February 15, 1929, in the course of his employment as an employee of said company, which judgment was affirmed by the Supreme Court of Missouri in the sum of $10,000.00, and the judgment stands as of said February 13, 1931, in said amount [R. 51-52, 78-79, 105-106, 114, 103 F. (2d), l. c. 997].

On December 1, 1931, T. J. Moss Tie Company, a general creditor, filed in the United States District Court for the Eastern District of Missouri, its bill of complaint against the Wabash Railway Company, alleging the Wabash Railway Company to be insolvent and unable to pay its debts and praying the appointment of receivers (R. 2-14). On that same day the Wabash Railway Company filed its answer admitting the allegations of the bill and joining in the application for the appointment of receivers (R. 14-16), and the Court thereupon, on said date, entered an order appointing Walter S. Franklin and Frank C. Nicodemus, Jr., the Wabash president and assistant

general counsel, respectively, as Receivers of said Wabash Railway Company (R. 16-21, 53). Also, on said day, said District Court appointed as general counsel for the said Receivers, one Nat S. Brown, who was, at said time, vice-president and general solicitor of the Wabash Railway Company (R. 21-22, 16).

Thereafter, on March 19, 1932, said District Court appointed a Special Master to hear claims of Wabash Railway Company's creditors (R. 22-23).

Thereafter, on April 7, 1932, said District Court made an order for the filing with, and hearing by, the Master of claims of creditors of the Wabash Railway Company (R. 23-25). No provision was made in such order relative to the form or contents of proofs of claim.

Thereafter, and within the time fixed by said order, petitioner filed with the Special Master his claim on his said judgment which was then pending on appeal in the Supreme Court of Missouri (R. 102, 106-107).

Thereafter, on August 31, 1932, the Wabash Receivers filed with the Special Master their answer to petitioner's said claim, admitting that judgment was rendered in favor of petitioner, as claimed by him, denying that the claim was entitled to any preference or priority, and praying that, if petitioner's claim be allowed, it be not classified as to be entitled to any priority or preference (R. 109).

On August 26, 1935, and on January 6, 1936, a hearing was had before said Special Master upon petitioner's claim (R. 102-105). Thereafter, on March 7, 1936, the Special Master filed in said District Court his partial report covering, among other things, petitioner's said claim, and reporting that petitioner's claim should be allowed in the aggregate sum of $10,587.15 as a general unsecured claim and without any lien or priority (R. 34-37). Peti-

tioner had no notice of the filing of such report until about the time he applied for leave to file, in the said District Court, his hereinafter mentioned petition (R. 62). At the time petitioner sought to file in the said District Court his hereinafter mentioned petition, said report of the Master had not been approved or confirmed by said District Court (R. 62).

On March 1, 1937, and November 1, 1937, respectively, the trustees, under two mortgages, filed their respective bills of complaint against the Wabash Railway Company for mortgage foreclosures and other judgments incident thereto. Both of these proceedings were consolidated with the original receivership proceeding against the Wabash Railway Company; the Receivers appointed in said original cause were continued as Receivers in said consolidated cause; and said consolidated cause was, and is being, carried on in said District Court as Consolidated Cause in Equity, No. 12,099 (R. 37-44, 66-67, 80-81, 114-115).

On October 8, 1933, the said Walter S. Franklin having resigned as such Receiver (R. 32), the said District Court appointed, as his successor, one Norman B. Pitcairn (R. 33-34, 52).

On January 26, 1938, petitioner filed in the said District Court, and in said consolidated cause, an application for leave to file therein a petition in the form to said application attached, and which petition asserted a right to have petitioner's said judgment paid as a prior claim and operating expense, and prayed, among other things, the discharge of said Receivers and the termination of the receivership, for the reasons mentioned in such petition and to the end that petitioner should not be further delayed or hindered in the collection of his judgment (R. 47-77). Said

petition, in substance, alleged the matters hereinbefore referred to, and, also, among other things, that:

Section 77 (n) of the Bankruptcy Act, enacted subsequent to the commencement of the Wabash Railway Company receivership (and as existing at the time petitioner's said application was filed) provided that, in proceedings under said section for the reorganization of a railroad, claims for personal injuries to the employees of such railroad shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad (R. 69); that, because of such statutory provision, petitioner is entitled to have his said judgment paid to him immediately and his said right should not be impaired on account of the nature of the proceeding in which a reorganization of the Wabash Railway Company is sought; that under the rule and principle that equity follows the law, petitioner is entitled to the payment of his judgment as provided by said Section 77 (n); that the District Court's restraining of petitioner's right to collect his judgment is contrary to the spirit and intent of said provision made in said Section 77 (n) for the protection and immediate payment of claims for personal injuries to employees of a railroad corporation (R. 74-75); that under the order of the Interstate Commerce Commission, effective July 1, 1914, and providing that all damages and costs adjudged against a railroad in favor of employees for personal injuries should be classified in the accounts of a railroad as operating expenses, the petitioner's judgment is and should be considered as, an operating expense (R. 66); that Wabash Railway Company had and has in the State of Indiana 357.46 miles of railway and other property of the reasonable value of many millions of dollars and the Receivers have been operating the same since their appointment; that it is the law of Indiana, as declared by its Supreme Court in the case of McCullough et al. v.

Union Traction Company of Indiana et al., 206 Indiana Reports 585, that claims for personal injuries arising in the operation of a railroad have a preference and priority over claims of mortgage creditors and should be considered and paid as operating expenses (R. 65-66); that the claim of petitioner is one entitled to priority over the liens of the mortgages, and is entitled to present payment as an operating expense.

The District Court denied petitioner's leave to file said petition, and, in so doing, in substance and effect ruled and held: that petitioner was but a general creditor; that his petition did not conform to the requirements of former Equity Rule No. 37; that petitioner's claim was an unsecured claim without lien or priority, and had correctly been so determined by the Special Master; that petitioner was estopped from asserting a claim for priority or preference (evidently because of petitioner's failure to except to the said report of the Special Master); that said petition stated no cause of action in equity; and that the granting of leave to file said petition would encumber and delay "the orderly process of these cases toward a reorganization of the properties of the defendant Railway Company" (R. 78-84). Thereupon, petitioner duly took an appeal to the United States Circuit Court of Appeals for the Eighth Circuit (R. 77-78, 84-99).

On May 13, 1939, after due submission, the United States Circuit Court of Appeals for the Eighth Circuit rendered its opinion and judgment upon petitioner's said appeal (R. 113-124), affirming the said judgment and decision of the said District Court. In its said opinion, so affirming said judgment and decision of said District Court, the said Circuit Court of Appeals held: "By subsection (n) of Section 77 of the Bankruptcy Act, as amended [11 U. S. C. A., par. 205 (n)], claims for personal injuries to employees of a railroad corporation are entitled to priority. • • •

But this subsection applies expressly to proceedings in bankruptcy, and * * * this is an equity receivership" (R. 120; 103 F. [2d], l. c. 1000); that, in an equity receivership proceeding for the reorganization of a railroad, personal injury claims of employees are general unsecured claims, without priority, and not entitled to payment as operating expenses; that the District Court had correctly decided that petitioner's said claim and judgment was a general unsecured claim and not entitled to any lien, priority or preference in payment; that petitioner, having failed to file exceptions to the said report of the Special Master, was estopped from asserting preference and priority of payment of his claim; and that the District Court had, and properly exercised, discretion to deny petitioner's application for leave to file his said petition in said consolidated cause.

Thereafter, on May 27, 1939, petitioner duly filed his petition for a rehearing in said cause in said Circuit Court of Appeals (R. 125-135) and said petition for rehearing was denied on the 12th day of June, 1939 (R. 137).

This Honorable Court granted a writ of certiorari limited to the question of the right of petitioner to intervene in the said consolidated cause in order to assert priority.

V.

SPECIFICATIONS OF ERROR.

A.

The decision of said District Court and the decision of said Court of Appeals for the Eighth Circuit that petitioner's said judgment and claim is a general unsecured claim, without priority, and not entitled to payment as an operating expense is in conflict with the amendatory provision in Section 77 (n) of the Bankruptcy Act, enacted

while petitioner's petition for certiorari was pending in this Honorable Court, that, in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation shall be preferred against and paid out of the assets of such railroad corporation as operating expenses of such railroad.

B.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that petitioner's said claim and judgment against Wabash Railway Company is a general unsecured claim, and not entitled to any priority or preference in payment.

C.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that petitioner's said claim and judgment is not entitled to present payment by the Receivers of Wabash Railway Company, as an operating expense.

D.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that petitioner's failure to except to the report of the Special Master, appointed by the District Court to hear claims, estops petitioner from being heard upon a question of the correctness of the conclusions of law of the Master upon undisputed facts.

E.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that the District Court had, and properly exercised, a discretion to deny petitioner leave to file the petition which, on January 26, 1938, he presented and applied to said District Court for leave to file in said receivership proceeding.

SUMMARY OF ARGUMENT.

I.

Pending the determination by this Court of petitioner's petition for writ of certiorari, the Congress enacted a law which requires that in an equity receivership of a railroad corporation "now or hereafter pending" in any court of the United States, claims such as that of petitioner "shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad," and this case should now be decided according to the law as it now exists.

Section 77-(n) of the Bankruptcy Act [11 U. S. C. A., Sec. 205 (n)], as amended by Act of Congress approved August 11, 1939;

United States v. Schooner Peggy, 1 Cranch. 103, 109;

Dinsmore v. Southern Express Company et al., 183 U. S. 115, 120;

Texas Company v. Brown, 258 U. S. 466, 474;

Home Savings & Loan Association v. Plass (C. C. A. 9), 57 F. (2d) 117;

Lewis' Sutherland Statutory Construction, 2nd Ed., Sec. 285.

II.

(A) Independent of said Act of Congress approved August 11, 1939, petitioner's judgment and claim, being for personal injuries sustained by him while performing his duties as an employee of Wabash Railway Company, arose and grew out of the operation of said railroad, and, therefore, is entitled to be preferred and paid as an operating expense.

Bowen v. Hockley et al., 71 Fed. (2d) 781, 783-786 (C. C. A. 4);

McCullough v. Union Traction Co. et al., 206 Ind. 585, 598-605, 186 N. E. 300, 305-307;
Central Hanover Bank & Trust Co. et al. v. Williams, 95 F. (2d) 210, 212 (C. C. A. 8);
Thompson v. Siratt, 95 F. (2d) 214, 217, 218 (C. C. A. 8);
Johnson v. United Railways Company, 247 Mo. 326, 373, 152 S. W. 362, 374 (dissenting judge's interpretation of what majority opinion holds).

(B) Equity follows the law and therefore, even prior to the enactment of the said amendatory act of August 11, 1939, specifically requiring the same, a railway employee's personal injury claim against a railroad was, in an equity receivership proceeding for the reorganization of such railroad, entitled to be preferred, and paid as an operating expense, in the same manner, and to the same extent, as if the railroad was being reorganized under Section 77 of the Bankruptcy Act as then existing.

Michigan v. Michigan Trust Company, Receiver, 286 U. S. 334, 346;
Bowen v. Hockley et al., 71 F. (2d) 781, 785.

(C) Wabash Railway Company is an Indiana corporation owning railway lines and property in Indiana. Under the law of Indiana personal injury claims against a railroad are entitled to priority and payment as operating expenses. The applicable decision of the Indiana Supreme Court speaks of "claims" for personal injuries, and does not restrict its holding to "judgments" recovered in the courts of Indiana on account of such claims.

McCullough v. Union Traction Company of Indiana, 206 Ind. 585, 598-604, 186 N. E. 300, 305-307.

(D) Under the orders and classification made by the Interstate Commerce Commission, by an order effective

July 1, 1914, petitioner's said claim and judgment is and should be considered and paid as an operating expense.

McCullough v. Union Traction Co. et al., 206 Ind. 585, 607 et seq., 186 N. E. 300, 308-309.

III.

The petitioner's failure to except to the report of the Special Master, appointed by the District Court to hear claims, does not (as the courts below held) estop petitioner from being heard upon a question of the correctness of the conclusions of law of the Master upon undisputed facts.

Employer's Liability Assurance Corporation v. Astoria Mahogany Company, 6 F. (2d) 945, 946 (C. C. A. 2);
Holman v. Cross, 75 F. (2d) 909, 913 (C. C. A. 6);
Lone Star Gas Company v. City of Fort Worth, 93 F. (2d) 584, 585 (C. C. A. 5);
State of Oklahoma v. State of Texas, 268 U. S. 252, 257;
Central Improvement Company v. Cambria Steel Co., et al., 201 F. 696, 699-700 (C. C. A. 8).

IV.

Petitioner has an absolute right to intervene in said consolidated cause for the purpose of asserting his right to have his said claim and judgment preferred and paid as an operating expense.

Rule 24, (a), New Federal Rules of Civil Procedure;
Credits Commutation Co. v. United States, 177 U. S. 311, 315-316;
Minot v. Mastin, 95 F. 734, 739 (C. C. A. 8);
Central Trust Company v. Chicago, R. I. & P. R. Co., 218 F. 336, 339 (C. C. A. 2);
Western Union Telegraph Company v. United States and M.-T. Co. et al., 221 F. 545, 552 (C. C. A. 8);
Swift v. Panther Oil & Gas Co., 244 F. 20, 30 (C. C. A. 8).

ARGUMENT.

I.

(Assignment of Error A.)

While petitioner's petition for certiorari was pending in this court, the Congress, by an act approved August 11, 1939,* amendatory of Section 77 (n) of the Bankruptcy Act [11 U. S. C. A., Sec. 205 (n)], added:

> "* * * equity receiverships of railroad corporations now or hereafter pending in any court of the United States,"

as a further type of proceeding in which

> "* * * claims for personal injuries to employees of a railroad corporation * * * shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad."

The Circuit Court of Appeals for the Eighth Circuit held, in the proceeding here sought to be reviewed, that petitioner's claim, although a claim against a railroad corporation in equity receivership in a federal court for personal injuries to an employee of such railroad corporation, was but a general unsecured claim, and entitled to no lien or priority (R. 119-121; 103 F. [2d], l. c. 1000), and further ruled that Section 77 (n) of the Bankruptcy Act, as it then existed, giving priority to railway employees' personal injury claims "* * * applies expressly to proceedings in bankruptcy, and * * * this is an equity receivership," so that petitioner's claim was not entitled to the priority given by said section 77 (n).

The situation now presented is that, pending the determination by this Honorable Court of petitioner's petition

* The act approved August 11, 1939, is set out in full in the appendix hereto, together with Section 77 (n) of the Bankruptcy Act as amended thereby.

for writ of certiorari, a law which, in effect, guarantees unto petitioner the right to have his claim and judgment preferred and paid as an operating expense was enacted, and the case should now be decided according to the law as it now exists.

The following rule was announced by Chief Justice Marshall in United States v. Schooner Peggy, 1 Cranch. 103, 109:

> "It is in general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied. * * * In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

The first part of the above pronouncement of Chief Justice Marshall was later quoted with approval by this Court in Dinsmore v. Southern Express Company et al., 183 U. S. 115, 120.

Likewise, in Texas Company v. Brown, 258 U. S. 466, 474, this Court, in discussing the effect of a law enacted after a judgment rendered below, and pending hearing on appeal, said:

> "Although passed after the decree below, this act must be given effect in deciding the appeal, * * *."

In Home Savings & Loan Association v. Plass (C. C. A. 9), 57 F. (2d) 117, the Court quoted with approval from Lewis' Sutherland Statutory Construction, 2nd Ed., Sec. 285, the following:

"If there has been a change or alteration or repeal of the law applicable to the rights of the parties, after the rendition of judgment, and pending an appeal, the case must be heard and decided in the appellate court, according to the existing law."

It is petitioner's contention that the holding of the District Court and the Circuit Court of Appeals, as to the classification of petitioner's claim, was incorrect, and that the Act of Congress, approved August 11, 1939, is but declaratory of the equitable principles which were theretofore applicable to claims such as that of petitioner. However, even if the petitioner's contention be incorrect, and even if the District Court and the Circuit Court of Appeals were correct in deciding, under the law as it then existed, that petitioner's claim was but a general unsecured claim, and not entitled to priority or payment as an operating expense, such determination and holding of those courts is incorrect under the now existing law enacted during the pendency of petitioner's petition for writ of certiorari herein, and the instant case should, we respectfully submit, be determined by this recent enactment which gives such claims a preferred status so as to be payable out of the assets of a railroad corporation in equity receivership as operating expenses of such railroad.

It is obvious that, in so changing and amending Section 77 (n) of the Bankruptcy Act, the Congress has undertaken to guarantee relief unto petitioner, and others similarly situated, from any inequitable classification of his and their claims, and any inequitable distinction between claims of an identical character in different types of proceedings involving the reorganization of a railroad.

II.

(Assignment of Errors B and C.)

Even absent the Act of Congress approved August 11, 1939, the holding of the District Court and the Circuit Court of Appeals, as to the classification of petitioner's claim, was incorrect, as being contrary to the equitable principle which, irrespective of said act, were and are applicable to claims such as that of petitioner.

Undoubtedly it was through a recognition of the fact that employees' claims for personal injuries bear a direct relationship to the operation of a railroad, and arise out of services through which a railroad is maintained as a going concern, and without which services and operation its property and the liens of mortgages thereon would become worthless, that Congress was prompted to and did provide by Section 77 of the Bankruptcy Act (as originally enacted), that, in proceedings thereunder for the reorganization of a railroad, employees' personal injury claims shall be preferred, and paid as operating expenses. The decision of the Circuit Court of Appeals that such rule did not obtain when a railroad was being reorganized through means of a receivership action, would have operated to make a railroad employee's ability to secure the protection which Congress had recognized he was entitled to receive, dependent, not upon those humane principles and concepts of justice which prompted such legislation, but, rather, upon the **nature of the proceeding** which those in control of a railroad, or its securities, elected as the means of effecting a reorganization. The injustice of such holding is even more marked by the fact that, as to the choice of form of a reorganization proceeding, an injured employee obviously has no voice.

The situation presented at the time of, and by, the de-

cisions of the courts below, was that, if the insolvent Wabash Railroad was being reorganized under Section 77 of the Bankruptcy Act, the petitioner's claim for personal injuries, sustained through his contribution to the maintenance and operation of the Wabash, would have been entitled to immediate payment in full [see 11 U. S. C. A., Sec. 205 (n), as it even then provided with respect to such claims]; but, under the decision of the courts below, because the Wabash reorganization proceeding is in the nature of an equity receivership, the petitioner's claim would be practically worthless.*

This Court, through its familiarity with matters of common knowledge, judicially knows that there are other railroads being reorganized under Section 77 of the Bankruptcy Act, in the federal courts within the territorial jurisdiction of the District Court below, and that, therefore, such railroads' employees' personal injury claims have been paid in full (Cf. Central Hanover Bank & Trust Co. v. Williams [C. C. A. 8], 95 F. [2d] 210; Thompson v. Siratt [C. C. A. 8], 95 F. [2d] 214). Here, however, the courts below hold that the same kind of a claim, must, by the same courts, be adjudged to be a general unsecured claim; and this, in effect, because those in control of the situation have seen fit to continue to seek a reorganization through a "friendly" receivership proceeding, rather than through a proceeding under said Section 77 of the Bankruptcy Act.

Petitioner respectfully submits that, just as uniformity of decisions of the federal courts on federal questions is of the utmost importance in the administration of justice, and that the rights of parties should be determined according to a uniform law of the land, and not according to the

*The record shows that the Wabash is hopelessly insolvent, and if petitioner is but a general creditor, then he can, at best, be expected to receive, at some uncertain date, some form of securities, the worth of which is doubtful.

locality of the district in which a cause is tried, so is it equally true that the right of this petitioner, as an injured employee, should be protected in accordance with the principles laid down by Congress, and not determined by the **nature of the proceeding** in which a federal court has ordered him to file his claim.

We submit that a federal court of equity may not use its power to operate a railroad, without regard to the priority which Congress has recognized that employees' personal injury claims should receive.

If, as the court below has ruled, the preference accorded railroad employees' personal injury claims, in proceedings under said Section 77 (n) of the Bankruptcy Act [11 U. S. C. A., Sec. 205 (n), as it existed at the time of such ruling], was not to obtain in an equity receivership proceeding for the reorganization of a railroad, how could such ruling be reconciled with the ancient and undisputed rule that "equity follows the law"? Here we have a situation in which the law-making body of the United States had accorded to railroad injured employees preferential rights in a railroad reorganization conducted through a **statutory** proceeding. Was not equity obligated to follow such law when it undertook to classify and determine the priorities of such a claim in an equity proceeding?

But, independent of the said provisions of Section 77 of the Bankruptcy Act, there are other reasons why this Court should review the decision of the court below that a railroad employee's personal injury claim is but a general claim, and not entitled to any preference or priority in payment.

The conflict of the decision of the court below with the applicable decision of the Circuit Court of Appeals for the Fourth Circuit, in the case of Bowen v. Hockley et al., 71 F. (2d) 781, as well as the true principles of equity in the premises, readily appear from the following excerpts from

the opinion of the Circuit Court of Appeals for the Fourth Circuit, in said case of Bowen v. Hockley, 71 F. (2d), l. c. 783-786:

"* * * Uninjured laborers contribute by their labor to the operation of the business and are paid on the basis of that contribution. The employee who is injured or killed has made his contribution, * * *; and in equity and good conscience the compensation award should be held a charge on the income of the business, just as is the wage of the laborer * * *.

"The principle of equity applicable is that he who seeks equity must do equity. Creditors and lien claimants need not seek the aid of equity in enforcing debts and liens. When they ask a court of equity to grant the extraordinary relief of protecting a private corporation's business from the legal process of its creditors and to operate it under order of court so as to preserve its going concern value for their benefit, they should be willing that the claims of those who have helped to give it value as a going concern and whose claims have been imposed upon it by law as a fixed expense should be paid from the income derived from its continued operation" (71 F. [2d], l. c. 783).

"For the court not to require its receiver to make the compensation payments which the state law requires of the owner of the business, would place it in the position of using its power to preserve the business for stockholders and creditors, without regard to the most helpless class of those having claims against the business itself" (71 F. [2d], l. c. 785).

"The fact that the statute does not provide for the protection of those receiving compensation payments and that no decision has dealt with their rights in the absence of statute, is no reason why a court of equity in undertaking the operation of the business should not safeguard their rights. One of the glories of equity jurisprudence is that it is not bound by the strict rules of the common law, but can mold its decrees to do justice amid all the vicissitudes and in-

tricacies of life. The principles upon which it proceeds are eternal; but their application in a changing world will necessarily change to meet changed situations" (71 F. [2d], l. c. 786).

"Surely a court of equity, which has found means in receivership proceedings to protect the claim of the coal company which has furnished coal, the steel company which has furnished rails, and the workman who has furnished labor prior to the receivership, is not powerless to protect the rights of the injured employee in the business which he has helped to build" * * * (71 F. [2d], l. c. 786).

In Bowen v. Hockley et al., supra, the claim had been liquidated by an award by the Workmen's Compensation Commission. In the case at bar, petitioner's claim for injuries sustained by him as an employee, was liquidated by the judgment of a court. Both claims arose out of the contribution, by an employee, to the operation of his employer's business. Whether the tribunal determining the responsibility of the employer, and the amount of the claim, be a commission or a court, and whether the claim, as liquidated, be denominated an "award" or a "judgment," is, of a certainty, immaterial.

The court below, has, in substance, and in direct conflict with said decision of the Circuit Court of Appeals for the Fourth Circuit, held that an employee's personal injury claim is but a general claim, and that a court of equity, while operating a business through its receivers, should not require the receivers to pay an injured employee a claim for which he has recovered a judgment, and which judgment he would be entitled and able to collect, in the absence of the Court's possession and operation of the property and business through its receivers.

It may be said, however (as mentioned in the decision of the court below), the weight of authority in federal courts has long been that employees' claims for personal

injuries are but general claims. But this is sufficiently answered by the language in Bowen v. Hockley, supra, that:

> "The principles upon which it (equity jurisprudence) proceeds are eternal; but their application in a changing world will necessarily change to meet changed situations" (71 F. [2d], l. c. 786).

By said provisions of Subsection (n) of Section 77 of the Bankruptcy Act [11 U. S. C. A., Sec. 205 (n)] Congress has recognized the necessity and justice of preferring, and paying as operating expenses, the personal injury claims of railroad employees. Can it be reasonably contended that a court of equity, in its consideration of claims of this character, should be any less just and reasonable, or less conscious of changing views, than Congress?

It is significant to note that the Interstate Commerce Commission, by an order effective June 1, 1914, prescribing a classification of operating revenues and operating expenses for the use of carriers by rail, in keeping of their revenue and operating expense accounts, required that all damages and costs adjudged against a railroad company in favor of employees for personal injuries should be classified as operating expenses (R. 66).

With reference to such order the Supreme Court of Indiana, in the case of McCullough v. Union Traction Co., 206 Ind. 585, 607 et seq., 186 N. E. 300, 308 et seq., said:

> "We cannot agree to the proposition that the rules prescribed by the Interstate Commerce Commission is merely a bookkeeping method." * * *
>
> "The contention that the regulations prescribed by the Interstate Commerce Commission is merely a bookkeeping method is untenable. If the contention is true, then the system is absolutely meaningless and without substance."*

* The Wabash is an Indiana corporation, and a large part of its railway system is located in Indiana (R. 65-66).

In said case of McCullough v. Union Traction Co. of Indiana, 206 Ind. 585, 598-604, 186 N. E. 300, 305-307, the Court said:

> "If such claims are operating expenses of a railroad when operated by a receiver why are they not operating expenses before a receiver has been appointed?"
>
> "* * * In the operation of railroads, accidents, and injuries to persons and property, are unavoidable, and the payment and settlement of such claims must necessarily be considered as operating expenses." * * *
>
> "* * * So, in the instant case, the mortgagees for years had intrusted the property covered by the mortgage to the mortgagor for his complete control and management. They knew that in the natural course of events damage to property, and injury to persons would be done by the negligence of the servants of the mortgagor in the operation and management of the Traction Company. They knew when they took their mortgage that railroads cannot be operated, and managed over a long period of time, without damage to property, and injuries to persons. They also knew that it is the law of the land, that those damaged, and injured through the negligence of the railroad would be entitled to recover their damage whatever it may have been. And knowing all of these facts is it not sound reason to say that they took the mortgages with knowledge of the fact that the operating expenses of the road must be paid? And it must be conceded that such claims are considered operating expenses."

III.

(Assignment of Error D.)

The court below, has, in effect, decided that petitioner's failure to except to the report of the Special Master, appointed by the District Court to hear claims, estops petitioner from being heard upon a question of the correctness

of the conclusions of law reached by the Master upon undisputed facts. Such decision is in conflict with the applicable decisions of the Courts of Appeals for other circuits. (It will be borne in mind that the Special Master's said report had not been confirmed and petitioner alleged that he had but recently learned of its having been filed [R. 62].)

In Employers' Liability Assurance Corporation v. Astoria Mahogany Company, 6 F. (2d) 945, 946 (C. C. A. 2), the Court said:

> "Orders of foreclosure are primarily intended for no more than safety in distribution. • • • They enable the receivers to dispose of the property, but not to forfeit the rights even of dilatory creditors."

In Holman v. Cross, 75 F. (2d) 909, 913 (C. C. A. 6), the Court said:

> "It is to be noted that, with respect to the defendants who did not except, the Court confirmed the Master's report upon the facts, but noticed such legal conclusions as found no support therefrom under the rule of Smith v. Seibel et al. (D. C.), 258 F. 454. This course we approve."

In Lone Star Gas Company v. City of Fort Worth, 93 F. (2d) 584, 585 (C. C. A. 5), the Court said:

> "The Master's report is not unassailable as is argued. The reference does not appear to have been by consent of both parties to an agreed Master, but if it had been it would, under the new Equity Rule 61½, 28 U. S. C. A., following section 723, be only advisory. The District Judge appears to have felt himself overmuch bound by it."

As appears from the record, there has been no hearing upon any Plan of Reorganization of Wabash Railway

Company and no distribution of its assets (R. 67). Clearly, therefore, the petitioner's failure to file exceptions to the Special Master's said report has not prejudiced, and could not prejudice, the rights of any party whatsoever. In the case of State of Oklahoma v. The State of Texas, 268 U. S. 252, 257, this Court said:

> "Only where conduct or statements are calculated to mislead a party and are acted upon by him in good faith to his prejudice can he invoke them as a basis of such an estoppel."

IV.

(Assignment of Error E.)

Under the circumstances in this case, the petitioner has an absolute right to intervene in said Consolidated Cause for the purpose of asserting his right to have his said claim and judgment preferred against and paid out of the assets of Wabash Railway Company as operating expenses of said railroad. The property of Wabash Railway Company is in the exclusive jurisdiction and subject to the exclusive disposition of the said District Court, and petitioner's said claim can be established, preserved and enforced in no other way than by the determination and action of that Court in said Consolidated Cause.

Rule 24 (a) of the New Federal Rules, gives an absolute right to intervene "* * * when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the Court or of an officer thereof."

In Credits Commutation Co. v. United States, 177 U. S. 311, 315-316, this Court quoted with approval the following portion of the opinion of the Circuit Court of Appeals for the Eighth Circuit in its consideration of such case:

> "It is doubtless true that cases may arise where

the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervenor's claim by denying him all right to relief."

In the case of Minot v. Mastin (8th C. C. A.), 95 F., l. c. 739, the Court said:

"There are other cases, however, where the right of a third party to intervene in a pending case is so imperative, resting, as it does, on grounds of necessity, and the inability of the party to obtain relief by other means, that the right cannot be said to be dependent upon judicial discretion."

In the case of Central Trust Company v. Chicago, R. I. & P. R. Co. (2nd C. C. A.), 218 F. 336, l. c. 339, the Court said:

"There is a class of cases where the claimant's rights are finally disposed of and intervention is necessary for their protection, in which the right to intervene is absolute. * * *

"* * *. The circumstances of this case are such as to cause us to think that the intervention should have been allowed. Very substantial rights are involved and serious objections made. * * *

"The orders certainly did completely dispose of the petitioner's claims and left nothing further to be done as to them in the litigation.". (Emphasis ours.)

In the case of Swift v. Panther Oil & Gas Co. (8th C. C.

A.), 244 F., l. c. 30, the late Judge Walter H. Sanborn restated clearly the controlling law as follows:

> "In intervention there are two classes of cases—one class in which the intervention is not indispensable to the preservation or enforcement of the claim of the petitioner, and there the permission to intervene is discretionary with the Court; another class in which the petitioner claims a lien upon or an interest in specific property in the exclusive jurisdiction and subject to the exclusive disposition of the Court, and his interest therein can be established, preserved or enforced in no other way than by the determination and action of that Court. The petitioner, who has a claim of the latter class, has an absolute right to intervene in the proceeding in which the Court holds the exclusive custody and dominion of the property; permission for him to intervene is not discretionary with the Court, and he may review by appeal an order refusing that right (cases cited)."

In view of the said amendatory act of August 11, 1939, providing, as it does, that in equity receiverships of railroad corporations NOW or hereafter pending in any court of the United States, claims, such as that of petitioner, shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad, there can be no question but that petitioner is, at this time, independent of every other consideration, entitled to take all such steps, and have made all such orders, as are necessary and proper, to the end that his said judgment and claim shall be preferred and paid out of the assets of Wabash Railway Company as an operating expense of such railroad.

CONCLUSION.

We respectfully submit that this case is one calling for the exercise by this Court of its supervisory powers by

reversing the judgment and decision of the courts below and making such orders as to this Court may seem necessary and appropriate to the end that petitioner's said claim and judgment be preferred and paid out of the assets of Wabash Railway Company as operating expenses.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX.

The Act of Congress approved August 11, 1939, is in words and figures as follows:

"[Public—No. 386—76th Congress]

[Chapter 689—1st Session]

[S. 2654]

An Act

To amend subsection (n), section 77, of the Bankruptcy Act, as amended, concerning payment of preferred claims.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the first sentence of section 77, subsection (n), of the Bankruptcy Act, as amended, be further amended to read as follows:

"'In proceedings under this section, and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds, executed by sureties without security, for and in any action brought against such railroad corporation or trustees appointed pursuant to this section, shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad.'

"Approved, August 11, 1939."

Section 77 (n) of the Bankruptcy Act [11 U. S. C. A., Sec. 205 (n)], as amended by the foregoing act approved

August 11, 1939, is as follows (italicized portion added by the act approved August 11, 1939):

"In proceedings under this section, *and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States,* claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds, executed by sureties without security, for and in any action brought against such railroad corporation or trustee appointed pursuant to this section, shall be preferred against and paid out of the assets of such railroad corporation as operating expenses of such railroad. No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees except in the manner prescribed in the Railway Labor Act, as amended June 21, 1934, or as it may be hereafter amended. No reorganization effected under this Act and no order of the Court or Commission in connection therewith shall relieve any carrier from the obligation of any final judgment of any Federal or State court rendered prior to January 1, 1929, against such carrier or against one of its predecessors in title, requiring the maintenance of offices, shops, and roundhouses at any place, where such judgment was rendered on account of the making of a valid contract or contracts by such carrier or one of its predecessors in title."